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No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL,
ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed July 30, 1982
Certiorari Granted November 1, 1982

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1978		
8-24	1	Fld complt for declaratory judgment & damages, request & ord for serv of process by other than US Mars., issd summ to atty, (JS5)
10-11	2	Fld plft not of mot & mot for preliminary injunction not for 10-12-78 at 9 am t/w memo of P&A. & exhib.
10-12	3	Ent ord hrg pltf mot for P/Inj—denied. (N)
1-21	4	Fld stip for extension of time to ans or otherwise plead to 11-10-78 (N)
	5	Fld stip for extension of time to ans or otherwise respond to 11-22-78 (N)
11-22	6	Fld deft not of mot for 12-11-78 at 10:30 am, mot to dism or in the alternative for S/J t/w memo of P&A in supp of mot t/w exhib & proof of serv.
12-7	7	Fld stip for cont of mots hrg from 12-18-78 at 1-8-79 at 10:30 am (N)
12-26	8	Fld def supplemt affd to deft mot to dism or in the alternative for S/J t/w cert of serv.
1979		
1-2	9	Fld plft memo in oppo to deft mot to dism & for an ord granted S/J t/w exhib & decl of atty.
1-4	10	Fld deft reply memo in supp of deft mot to dism & or for S/J. t/w cert of serv.
1-8	11	Ent ord hrg deft mot to dism-mot granted; deft to prepare ord. (N)
1-30	12	Fld ord of dismissal that deft mot is granted w/out leave to amend. (N)
	13	Fld jgmt that complt be dism. (Ent 1-30-79) (JS6) (mld cys)
3-6	14	Fld NOTICE OF APPEAL as to jdgmt ent 1-30-79.
3-7	—	Mld notice for filing designation of record on appeal.
3-14	15	Fld Designation of Record on appeal. Mld cys
3-23	16	Fld defts designation of repts trans. t/w cert of serv. (Mld cys)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N
Filed: August 24, 1978

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, GEORGE SHANNON complain of COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT KENNETH JORDON, LIEUTENANT BARRON BIANCO, EMC RICHARD McCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA and state:

JURISDICTION

1. This is a civil action against members of the United States Navy seeking damages, declaratory judgment, and

injunctive relief to redress deprivation by defendants of plaintiffs' rights, privileges and immunities secured by the Fifth Amendment to the United States Constitution including 42 U.S.C. 1985 as well as defendants' abuse of their authority, defendants' failure to follow regulation, and defendants' corrupt, and discriminatory acts toward the plaintiffs. The amount in controversy exceeds $10,000 exclusive of interests and costs. This court has jurisdiction of this action under 28 U.S.C. Sections 1331 and 1343. Venue is proper. 28 U.S.C. 1391.

NATURE OF THE ACTION

2. Plaintiffs are all Black Americans who enlisted in the United States Navy and are currently assigned to Weapons Department, Supply Department and Engineering Department aboard the U.S.S. Decatur (DDG 31). The command of the U.S.S. Decatur is made up essentially of the defendants who are all Anglo-American or white officers. The plaintiffs are being discriminated against in their job assignments, in the schools they can attend, in the treatment at Non-Judicial Punishment, in their quarterly marks and in the skilled rates because they are Black.

Defendants committed the acts against the plaintiffs in violation of their civil rights in an effort to keep plaintiffs in the unskilled ratings in the U.S. Navy, in the most dangerous and dirtiest assignments, in the most unpleasant surroundings, out of schools where it is possible to advance, out of the advanced rates and in a condition of servitude and dependency. Plaintiffs are also discriminated against at Captains Masts and in evaluations. As a result of defendants' malicious and discriminatory acts, plaintiffs will not be able to develop a career in the Navy and will suffer once they are discharged. Plaintiffs seek money damages from defendants, a declaratory action stating their rights, and injunctive relief against continued discrimination.

PARTIES

3. Plaintiff VERNON WALLACE is a Black American stationed in First (Deck) Division, Weapons Department

aboard the U.S.S. Decatur. He enlisted in the U.S. Navy on August 13, 1976 and is currently a Seaman (E3). He was born and raised n San Antonio, Texas.

4. RICHARD LEMONS, is a Black American who was born and raised in San Antonio, Texas. He is an Electrician Third Class and is currently stationed in Engineering Department aboard the U.S.S. Decatur. He enlisted in the U.S. Navy on August 29, 1975.

5. CORNELIUS HICKEY is a Black American who was born and raised in Rockville Center, New York. He is a Messman and is a member of the Supply Department of the U.S. Decatur. He enlisted in the U.S. Navy on February 17, 1977.

6. JAMES RICHARDSON is also a Black American who was born and raised in Memphis, Tennessee. He is a Messman Third Class and is a member of the Supply Department of the U.S.S. Decatur. He enlisted in the U.S. Navy on August 28, 1975.

6a. GEORGE SHANNON is also a Black American. He is a Messman aboard the U.S.S. Decatur. He enlisted in the United States Navy on January 16, 1975.

7. Defendant COMMANDER GEORGE C. CHAPPELL, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Commanding Officer of the U.S.S. Decatur. COMMANDER CHAPPELL was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

8. Defendant LIEUTENANT CLARENCE SCHULTZ, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Engineering Officer of the U.S.S. Decatur. LIEUTENANT SCHULTZ was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

9. Defendant LIEUTENANT COMMANDER KENNETH VIAFORE, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Executive Officer of the U.S.S. Decatur. LIEUTENANT COMMANDER VIA-

FORE was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

10. Defendant LIEUTENANT KENNETH JORDON, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Operations Officer of the U.S.S. Decatur. LIEUTENANT JORDON was directly responsible for acts and ommissions complained of by one or more of the plaintiffs herein.

11. Defendant LIEUTENANT BARRON BIANCO, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Supply Officer of the U.S.S. Decatur. LIEUTENANT BIANCO was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

12. EMC RICHARD McCANNON is an Anglo-American non-commisioned officer in the United States Navy and at all times relevant to the matters in the Complaint, one of the chiefs in E Division, Engineering Department, aboard the U.S.S. Decatur. EMC McCANNON was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

13. IC DAVID LAMSER is an Anglo-American non-commisioned officer in the United States Navy and at all times relevant to the matters in the Complaint, the head of Electrical Division. ICC LAMSER was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

14. MSC LUMBERTO PAPA is Filipano-American non-commissioned officer in the United States Navy and at all times relevant to the matters in the Complaint, a chief in the Supply Department aboard the U.S.S. Decatur. MSC PAPA was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

FIRST CLAIM OF PLAINTIFF WALLACE

15. On or about December 9, 1976, plaintiff WALLACE was transferred to U.S.S. Decatur, First Division, as a Seaman Apprentice.

16. On or about October 15, 1977, plaintiff WALLACE completed the courses for Operations Specialists and was transferred to Operations Intelligence (OI) Division, Operations Department, as a striker for Operations Specialist Third Class (E-4).

17. Plaintiff WALLACE performed the requirements, completed the courses and appeared before the Professional Development Board on or about July 18, 1978. The board was made up of five chief petty officers. This Board recommended that WALLACE remain in OI Devision.,

18. On or about July 21, 1978, the OI Division Officer, Lieutenant W.J. Bloss, recommended that WALLACE be designated as a striker for Operations Specialist and remain in OI Division.

19. On or about July 24, 1978, defendant JORDON recommended that WALLACE not be designated as a striker for Operations Specialist because of the ostensible reason that he does not possess the capability to ever qualify as an Operations Specialist or the desire to exhibit sustained effort.

20. On or about July 24, 1978, defendant CHAPPELL disapproved WALLACE's request to strike for Operations Specialist and transferred WALLACE to First Division.

22. On or about August 4, 1978, Plaintiff WALLACE requested to be transferred to OI Division. It was denied.

23. All Naval Commands are required to maintain an equal opportunity program for their personnal pursuant to naval regulations (OPNAV Instruction 5354.1a, March 8, 1978). Pursuant to that regulation it is stated:

> "It is the policy of the Navy to ensure equality of opportunity and treatment for all military members and civilian employees of the Deartment of the Navy regardless of race, creed, color, sex or national origin.... Discrimination resulting in the denial of equal opportunity to any individual will not be tolerated in the Navy."
>
> OPNAV Instruction 5354.1A (Op-01P)

Chapter II, Section 7 of the program provides that there shall be equality of opportunity in training and advancement and affirmative action to provide non-rated personnel

with opportunity to strike for ratings commensurate with demonstrated ability and desire.

24. The OI Division is manned by mostly Anglo-Americans and does not contain any Black Americans.

25. The actions of defendants CHAPPELL, VIAFORE, and JORDON in removing plaintiff WALLACE and denying his request to return was primarily because of the fact that plaintiff WALLACE is a Black American.

26. Defendants CHAPPELL, VIAFORE and JORDON abused their discretion, exceeded their legal authority, failed to follow and willfully and maliciously disregarded Navy regulations in denying plaintiff WALLACE's right to remain in OI Division.

27. The conduct of defendants described above deprived plaintiff WALLACE of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

28. As a direct result of defendants CHAPPELL, VIAFORE and JORDON's willful, malicious and unlawful actions and ommissions plaintiff WALLACE was subjected to emotional and mental stress because of the discriminatory practices.

29. As a direct result of defendants CHAPPELL, VIAFORE and JORDON's discriminatory actions, plaintiff WALLACE was removed from the possibility of acquiring a skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

30. As a direct result plaintiff WALLACE has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff WALLACE prays for judgment against defendants CHAPPELL, VIAFORE and

JORDON as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF WALLACE

31.-46. Plaintiff WALLACE adopts paragraphs 15 through 29 as paragraphs 31 through 46.

47. Defendants CHAPPELL, VIAFORE, and JORDON conspired to deprive plaintiff WALLACE of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

48. As a direct result plaintiff WALLACE has suffered compensatory damage in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE and JORDON as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF LEMONS

49. On or about November 5, 1977 Plaintiff ROBERT LEMONS was transferred to the U.S.S. Decatur, Engineering Department, as an electrician third class.

50. During the period from December, 1977 to August, 1978, plaintiff LEMONS was assigned to perform three tasks (issue tools, order parts, and act as a career counselor) by defendants SCHULTZ, McCANNON and LAMSER. Due to the magnitude of these jobs it was impossible to complete all of them on a daily basis., Plaintiff LEMONS would constantly complain to defendants SCHULTZ, McCANNON and LAMSER about this.

51. During the same period plaintiff LEMONS was constantly being assigned numerous tasks by defendants McCANNON and LAMSER. This is true even though there were numerous enlisted personnel who were not assigned tasks when they completed their old task but many of the tasks were instead assigned to plaintiff LEMONS. Plaintiff LEMONS would complain to defendants SCHULTZ, McCANNON and LAMSER about this and the inability to complete all of the assignments.

52. Plaintiff LEMONS was sent to Captain's Mast in July, 1978 pursuant to 10 U.S.C. 815 for violation of 10 U.S.C. 982. Plaintiff LEMONS had his clothes in his work space because the keys to his locker had been misplaced. At the Captain's Mast plaintiff LEMONS was convicted and awarded a fifty dollar fine.

On or about the same time, Robert Knott, an Anglo-American enlisted was sent to Captain's Mast for a seven day unauthorized absence. All of the punishment was suspended. Plaintiff LEMONS protested this.

53. As a result of the three above mentioned actions and complaints, defendants McCANNON, LAMSER, VIAFORE and SCHULTZ have prepared an evaluation recommending that plaintiff LEMONS' quarterly marks be lowered to an average of 3.0 and that he not be recommended for advancement. For the same period Robert Knott's quarterly marks were 3.8.

54. As a result, plaintiff LEMONS will not be allowed to take the examination for second class to be held in September, 1978. Plaintiff LEMONS will suffer irreparable harm because his chance to advance will be denied and his career in the Navy will be jeopardized and he will also suffer loss when discharged.

55. OPNAV Instruction 5354.1a, Chapter II, Section 5 (Equal Opportunity in Military Justice) mandates that there be equality of justice and treatment for minority personnel and non-military personnel and that racial, ethnic, cultural or sexual basis not be factors. Section 7, of the same instruction requires that duty assignments be rotated on an equal basis.

56. The conduct of defendants described above deprived plaintiff LEMONS of his rights under the Constitution and laws of the United States, including the right not be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

57. As a direct result of defendants SCHULTZ, McCANNON, VIAFORE and LAMSER's willful, malicious and unlawful actions and omissions plaintiff LEMONS was subjected to emotional and mental stress because of the discriminatory practices.

58. As a direct result of VIAFORE, SCHULTZ, McCANNON, and LAMSER's discriminatory actions, plaintiff LEMONS was removed from the possibility of advancement and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

59. As a direct result plaintiff LEMONS has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff LEMONS prays for judgment against defendants VIAFORE, SCHULTZ, McCANNON and LAMSER as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF LEMONS

60.-69. Plaintiff LEMONS adopts paragraphs 49 through 58 as paragraphs 60 to 69.

70. Defendants VIAFORE, SCHULTZ, McCANNON and LAMSER conspired to deprive plaintiff LEMONS of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

71. As a direct result plaintiff LEMONS has suffered compensatory damage in the amount of five hundred thousand dollars, and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants VIAFORE, SCHULTZ, McCANNON and LAMSER as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF HICKEY

72. On or about July 10, 1977, Plaintiff HICKEY was transferred to the U.S.S. Decatur, Supply Department.

73. Since that time Plaintiff HICKEY has worked as a messman in the galley aboard the U.S.S. Decatur, Supply Department. experience and schooling than SN Wolf, an Anglo-American and SN Aguon, a Hawaiian-American. Defendants PAP and BIANCO recommended Wolf and Aguon for positions as petty officers (Messman Third Class) and refused to recommend Plaintiff HICKEY in July, 1978.

74. Defendants CHAPPELL, VIAFORE, BIANCO and PAPA never notified HICKEY that a schooling for records clerk and a position as records cherk in Supply Department U.S.S. Decatur, would be opening in July, 1978. Instead, two Anglo-Americans, SN Wolf and MS3 Anderson were sent to records school and recommended for the position as records clerk. Plaintiff HICKEY complained of these actions to the defendants.

75. Plaintiff HICKEY asked MSC PAPA to be sent to record school. MSC PAPA told HICKEY he did not have enough time in the galley. Instead, SN Wolf was sent to the records school when he had less time in the galley than HICKEY.

76. OPNAV Instruction 5354.1a, Chapter II, Section 7 provides that programs for advancement in rate be available to all personnel regardless of racial, ethnic, cultural or sexual background. Section 8 requires equal rotation of all work assignments regardless of race or ethnic background.

77. The conduct of defendants described above deprived plaintiff HICKEY of his rights under the Constitution and laws of United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

78. As a direct result of defendants CHAPPELL, VIAFORE, BIANCO and PAPA's willful, malicious and unlawful actions and omissions, plaintiff HICKEY was subjected to emotional and mental stress because of the discriminatory practices.

79. As a direct result of defendants CHAPPELL, VIAFORE, PAPA and BIANCO's discriminatory actions, plaintiff HICKEY was removed from the possibility of acquiring an advanced rating and rotation of positions for skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

80. As a direct result plaintiff HICKEY has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff HICKEY prays for judgment against defendants CHAPPELL, VIAFORE, BIANCO and PAPA as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF HICKEY

81.-88. Plaintiff HICKEY adopts paragraphs 72 to 79 above as paragraphs 81 through 88.

89. Defendants CHAPPELL, VIAFORE, BIANCO and PAPA conspired to deprive plaintiff HICKEY of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. section 1985.

90. As a direct result plaintiff HICKEY has suffered compensatory damages in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE, BIANCO and PAPA as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF RICHARDSON

91. On or about November 7, 1977, plaintiff RICHARDSON was transferred to U.S.S. Decatur, Supply Department, as a Messman Third Class.

92. Since that time plaintiff RICHARDSON has worked as a Messman in the galley aboard the U.S.S. Decatur.

93. Plaintiff RICHARDSON was told by defendant PAPA that a position as a record clerk and the record school position were available in July 1978 in Supply Department on the U.S.S. Decatur, and that he would be sent to records school and recommended for the position as records clerk. Instead, MS Anderson and SN Wolf, two Anglo-Americans, were sent to records school by defendants.

94. Plaintiff RICHARDSON was told that he would not be sent to records school or recommended as the records clerk on or about August 1, 1978. SN Wolf was sent to records school even though he has less time in the galley aboard the U.S.S. Decatur than Plaintiff RICHARDSON.

95. OPNAV Instruction 5354.1a, Chapter II, Section 7 provides that programs for advancement in rate be available to all personnel regardless of racial, ethnic, cultural or sexual background. Section 8 requires equal rotation of all work assignments regardless of race or ethnic background.

96. The conduct of defendants described above deprived plaintiff RICHARDSON of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color, or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

97. As a direct result of defendants PAPA and BIANCO's willful, malicious and unlawful actions and omissions, plaintiff RICHARDSON was subjected to emotional and mental stress because of the discriminatory practices.

98. As a direct result of defendants PAPA and BIANCO's discriminatory actions, plaintiff RICHARDSON was removed from the possibility of acquiring an advanced rating and rotation of positions for skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

99. As a direct result plaintiff RICHARDSON has suffered damages in the amount of five hundred thousand dol-

lars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff RICHARDSON prays for judgment against defendants BIANCO and PAPA as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF RICHARDSON

100.-107. Plaintiff RICHARDSON adopts paragraphs 91 to 98 as paragraphs 100 to 107.

108. Defendants PAPA and BIANCO conspired to deprive plaintiff RICHARDSON of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

109. As a direct result plaintiff RICHARDSON has suffered compensatory damages in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against defendants PAPA and BIANCO as listed above, plus attorney's fees and costs of this suit.

FIRST CLAIM OF PLAINTIFF SHANNON

110. On or about January 21, 1978, plaintiff SHANNON was transferred to the U.S.S. Decatur, Supply Department.

111. Since that date, plaintiff SHANNON has worked as a Messman aboard the U.S.S. Decatur. On or about the third week of July, 1978, defendant BIANCO threatened the plaintiff SHANNON by telling him that he would strangle him with his bare hands for keeping the refrigerator door open. Plaintiff SHANNON reported this to defendant CHAPPELL who said that defendant BIANCO is a fair officer.

112. On or about mid July, 1978, defendant BIANCO made plaintiff SHANNON and other messmen clean the stove in the galley with toothbrushes.

113. On or about July 31, 1978, defendants BIANCO, VIAFORE and CHAPPELL gave the plaintiff SHANNON

a very low evaluation. This was totally unwarranted and without basis in fact.

114. On August 15, 1978, defendant CHAPPELL told plaintiff SHANNON that he would be discharged from the U.S. Navy because he lacks "common sense". Based on information and belief, defendant CHAPPELL will recommend that plaintiff SHANNON be given an other than honorable discharge.

115. OPNAV Instruction 5354.1a, Chapter II, Section 5 (Equal Opportunity in Military Justice) mandates that there is equality of justice and treatment for minority personnel and nonmilitary personnel and that racial, ethnic, cultural or sexual basis not be factors.

116. The conduct of defendants described above deprived plaintiff SHANNON of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

117. As a direct result of defendants CHAPPELL, VIAFORE and BIANCO's willful, malicious and unlawful actions and omissions, plaintiff SHANNON was subjected to emotional and mental stress because of the discriminatory practices.

118. As a direct result of defendants CHAPPELL, VIAFORE and BIANCO's discriminatory actions, plaintiff SHANNON will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

119. As a direct result plaintiff SHANNON has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff SHANNON prays for judgment against defendants CHAPPELL, VIAFORE and BI-

ANCO as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF SHANNON

120.-128. Plaintiff SHANNON adopts paragraphs 110 through 118 as paragraphs 120 to 128.

129. Defendants CHAPPELL, VIAFORE and BIANCO conspired to deprive plaintiff SHANNON of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

130. As a direct result plaintiff SHANNON has suffered compensatory damage in the amount of five hundred thousand dollars, and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE and BIANCO as listed above, plus attorney's fees and costs of this action.

131. Plaintiffs have all exhausted their administrative remedies.

Plaintiffs pray:

1. For a preliminary and permanent injunction prohibiting the defendants from:

(a) threatening, or intimidating Black enlisted personnel;

(b) keeping Black personnel in unskilled rates or out of schools and more preferential jobs or advancement;

(c) awarding more punishment at Captain's Mast to Black enlisted personnel; or

(d) awarding or recommending less than honorable discharges to enlisted personnel because of their race, color or national origin, or because they advocate equal opportunity for all or because they seek redress for discrimination practiced against them.

2. For an injunction compelling defendants to implement the naval instruction dealing with equal opportunity and treatment (OPNAV INST 5354.1a) on the U.S.S. Decatur;

3. That they be awarded compensatory damages in the amount of five million dollars ($5,000,000.00);

4. that they be awarded punitive damages in the amount of five million dollars ($5,000,000.00);

6. for all costs of suit; and
7. For such other and further relief as is equitable

JOHN MURCKO
Attorney for Plaintiffs
/s/ John Muricko
Attorney for Plaintiffs

DATED: AUGUST 21, 1978

VERIFICATION

I, VERNON WALLACE, depose and say:

I am one of the plaintiffs in the above-entitled action. I have read the aforegoing COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES and know the contents thereof. I swear and affirm the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief and as to those maters, I believe them to be true.

Executed this 20 day of August, 1978 at San Diego, California.

/s/ Vernon J. Wallace, Jr., 20 Aug. 78
VERNON WALLACE

I, ROBERT LEMONS, depose and say:

I am one of the plaintiffs in the above entitled action. I have read the foregoing COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES and know the contents thereof. I swear and affirm the same is true of my own knowledge, except as to matters which are therein stated upon my information and belief and as to those matters, I believe them to be true.

Executed this 20 day of August, 1978 at San Diego, California.

/s/ EM3 Robert C. Lemons
EM3 ROBERT C. LEMONS

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT KENNTH JORDON, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION PURUSANT TO RULE 65, FEDERAL RULES OF CIVIL PROCEDURE *

TO: Defendants and to their counsel of record:

Please take notice that on *October 12, 1978 at 9:00 A.M. or* as soon thereafter as counsel can be heard, plaintiff will move for a preliminary injunction against defendants for the below stated relief in Courtroom 5 of the United States District Court, 940 Front Street, San Diego, California.

Plaintiffs above named move this Honorable Court for a preliminary injunction in the above-entitled cause against the defendants above-named conformable to the complaint filed herein, enjoining defendants from:

---

* Injunctive relief denied by Judge Nielsen after hearing 10/12/78

1. Retaining the plaintiffs aboard the U.S.S. Decatur while they are deployed for duty in the Western Pacific on or about October 16, 1978.

2. In the alternative, and should that be denied, prohibiting inter-department transfer of any of the plaintiffs from their current departments to First Division.

The grounds in support of this motion are:

1. The U.S.S. Decatur (DDG 31) (hereafter Decatur) is an older ship. It was commissioned in approximately 1958.

2. The Decatur was originally scheduled to leave San Diego for duty in the Western Pacific on September 25, 1978 with DesRon Seven. It did not leave on that day because it had serious problems with the boilers, and numerous leaks in the fuel tanks. See Exhibit A, Declaration of James Richardson, attached hereto and incorporated by reference.

3. The Decatur, at the present, has the following operating problems:

a. The floating head on the number one boiler in the number one fireroom is leaking with one hundred pounds per square inch of presure;

b. The number one switchboard in the main controlroom is seriously unstable. It is running at 62 cycles instead of the normal 60 cycles:

c. The force draft blower which blows steam into the boiler is broken down;

d. Several life rafts on the U.S.S. Decatur are full of holes;

e. The fuel tanks on the Decatur have numerous holes in them which were temporarily repaired with plastic coating;

f. The fourstrap blowers in the number one engineroom broke down from overheating on October 5, 1978; and

g. Fuel is seeping into the galleys, i.e., food preparation areas. See Exhibit B, Declaration of Vernon Wallace, Exhibit C, Declaration of Robert Lemons, Exhibit A, Declaration of James Richardson.

4. These conditions are extremely dangerous and at any time a boiler can explode, a steam pipe leakage can cut a person in half, a leaking fuel tank can explode, and an over-

heated switchboard or blower can cause a serious fire or explosion. Should these occur it would be extremely difficult for many crew members, including plaintiffs, to leave the ship since several of the life rafts have holes in them.

5. The plaintiffs have been constantly harassed, mistreated and oppressed both before and since they have filed this action. Plaintiff Lemons had valid orders to report for duty on the U.S.S. Prairie on October 4, 1978. He was suddenly notified on October 5, 1978 that his orders were being cancelled without any explanation. See Exhibits C and D.

6. Plaintiff Richardson also has suffered numerous actions of harassment and mistreatment since he has filed this action. See Exhibit A.

7. Plaintiff Wallace has suffered constant attempts by the command to intimidate and confront him because he has been an outspoken critic of the discriminatory practices on the Decatur. He has been ridiculed by his former division officer, Lt. Hagstrom, and treated derogatorily by his Commanding Officer, defendant Chappell. He has had serious problems from the pressures on the ship. A naval psychiatrist has recommended that he be given time off, yet it has been refused by defendant Chappell. See Exhibits D, E, F and G, letters of medical doctors.

8. Plaintiff Hickey is also being mistreated and defendant Bianco has been threatened to be transferred from supply Department to First Division (Deck). See Exhibit H, Declaration of John Murcko.

9. Also there are graffitti in the restrooms derogatory to the plaintiffs all of whom are black. The graffitti includes: "KKK = Kill Kolored Kids", "NAACP = Niggers Are Actually Colored Polacks," and "KKK". The command has made no effort to stop this action or to apprehend the responsible parties.

10. Finally, the plaintiffs are all needed here to prepare for the suit. See Exhibit H, Declaration of John Murcko.

Therefore, it is requested that this court issue a preliminary injunction against the defendants, ordering that plaintiffs be transferred off the Decatur immediately and be retained in San Diego pending determination of the suit.

11. In the alternative it is requested that defendants be enjoined from transferring plaintiffs from the current department in which they are working to First Division.

/s/ _____

JOHN MURCKO
Attorney for Plaintiffs

Dated: October 11, 1978

JOHN MURCKO
Attorney at Law
861 Sixth Avenue, Su. 806
Post Office Box 8284
San Diego, Ca. 92192
Telephone: (714) 235-6921
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ROBERT LEMONS, CORNELLIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARANCE SCHULTZ, LIEUTENANT KENNETH JORDON, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

MEMORANDUM OF POINTS AND AUTHORITIES

I
THIS COURT HAS JURISDICTION

This court has jurisdiction under the actions complained under 42 U.S.C. Section 1985, 28 U.S.C. Section 1311, and 28 U.S.C. Section 1343.

Bolling v. Sharpe, 347 U.S. 497 (1954);
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)
Griffen v. Breckenridge, 403 U.S. 88, 97 (1971);
Bivens v. Six Unknown Agents of the FBN, 403 U.S. 388 (1971).

II
COURTS HAVE HELD THAT VIOLATIONS OF CONSTITUTIONAL RIGHTS OF MEMBERS OF THE ARMED FORCES ARE SUBJECT TO REVIEW

Numerous courts have held that orders of the military are subject to court review where they are in violation of

the constitutional rights of members of the armed forces. *Winter v. United States*, 393 U.S. , 21 L.Ed.2d 80 (1953); *United States ex rel Chapparo v. Resor*, F.2d , 2 SSLR 3157 (4th Cir. 1969); *In re Brown v. Brown*, ___ F. Supp. ___, 3 SSLR 3404 (1970).

In *In re Brown, supra*, the court held that transfer by the army is subject to review by the civilian courts where it is not for military need or exigency or national defense, but is for punishing a serviceman for exercising his constitutional rights.

In the *Chapparo* case, the Court of Appeals held that civilian courts had the authority to inquire into the reasonableness of pretrial restraint of eight enlisted people awaiting court martial for speaking up against the Viet Nam war.

See also *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1954) and *Reid v. Covert*, 354 U.S. 1 (1957).

III
A PRELIMINARY INJUNCTION SHOULD ISSUE

There are four requirements for a court to issue a preliminary injunction. They are (1) a strong showing that plaintiffs will prevail on the merits; (2) irreparable harm to the plaintiffs; (3) that the plaintiffs are in need of protection and the damages to the plaintiffs in absence of the injunction outweight the foreseeable harm to the defendants; and (4) the public interest. *Schwartz v. Covington*, 341 F.2d 537, 538 (9th Cir. 1965); *First Citizen Bank and Trust Company v. Camp*, 432 F.2d 481 (4th Cir. 1970).

In the instant case all four conditions exist. The plaintiffs will be irreparably harmed if they are forced to go on this WESPAC cruise. They could all be killed, or seriously maimed, or injured. At the least they could suffer mental harm from the constant harassment and mistreatment. Second, the plaintiffs could suffer irreparable harm because of the constant discriminatory treatment by the Anglo officers and non-commissioned officers. The defendants will not be harmed if these five persons leave the ship. They are only five out of three hundred and fifty crew members. Third,

the plaintiffs have a very strong case of discrimination based on clear discrimination in ranks and rates. There is no other recourse. The injunction should issue.

/s/_____

JOHN MURCKO

Attorney for Plaintiffs

DATED: October 11, 1978

DECLARATION

I, James Richardson, depose and say:

1. I checked aboard the U.S.S. Decatur in November, 1977. At that time I checked into Supply Division.

2. Since that time I have seen several violations of individual civil and constitutional rights. I later joined with four other crewmembers who felt as I did—that someone should bring these wrongs to light.

3. In so doing, I discovered that some of the crewmembers on the other side of the issue held my actions against me. I later talked with the Commanding Officer of the U.S.S. Decatur to explain my situation. This officer advised me that there was nothing he could do to assist me and that I should have thought of all of the consequences before deciding to sue the Decatur.

4. I find now that I am being harassed more often for even small things.

5. I feel that the ship itself is unsafe in that it has had several breakdowns. The repairs have been made on a hurry-up basis in order to make the correct deployment date.

6. In my work space I observed fuel all over the deck. When I reported it to my chief he made a call and, without even checking it for leaks, they said it would be okay. This is just one small example of the condition of the ship.

7. We were supposed to deploy sooner but we could not due to holes in the fuel tank.

8. I do not feel safe being aboard the U.S.S. Decatur, either physically or mentally.

9. All of my attempts to get off the ship have been stopped by the command. I feel the command wants me on the ship when it goes overseas to use me as an example of what happens when you speak out against the wrongs of the service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California on October 9, 1978.

JAMES A. RICHARDSON

DECLARATION

I, Vernon Wallace, depose and say:

1. I am a seaman (SN) in the U.S. Navy and am stationed aboard the U.S.S. Decatur (DDG 31), Naval Station, San Diego.

2. I have been aboard the U.S.S. Decatur since December 9, 1976.

3. In July, 1977, I testified at the court-martial of Wilbert Williams. In the main my testimony concerned the appearance of graffitti on the bulkheads in the washrooms and toilet areas of the U.S.S. Decatur. Such graffitti as "KKK" or "KKK = Kill Kolored Kids" or "NAACP = Niggers Are Actually Colored Polacks" appeared on these bulkheads.

4. I testified that I had reported to the command on the ship, but nothing had been done about it.

Shortly after this I began to feel a lot of pressures, both from the head of the department, Ensign McCloughlin and from the leading chief, BMC Simpson. I would repeatedly be chewed out and I also was constantly belittled by these two men, especially by Ensign McCloughlin.

In January, 1978, I was transferred to OI Division. I experienced the same type of treatment there from Lt. Jordan and Chief Parks. I was transferred out in July, 1978. to First Division.

5. In May, 1978, I was working in the Combat Information Center (CIC) OI Division. The ship was deployed to Hawaii. One day I came into work and noticed that a rope made in the shape of a noose was hanging in the overhead area of CIC. It was there nearly all morning from 8:00 a.m. to 12:00 p.m. and was highly visible. To me this represented a sign of the KKK. It frightened me. Chief Parks repeatedly passed it and looked at it but did nothing about it. I became outraged and prior to noon I told Chief Parks that the noose was against regulations and should be taken down. He seemed unhappy that I confronted him about it. Later, he told P03 Brandt in the work area to take it down.

6. During 1977 and 1978 I was repeatedly speaking up about the conditions on the ship, the inequality of treatment afforded to myself and other blacks, and the constant badgering by the OI command.

7. Lt. Jordan and Chief Parks would become irate when I raised these matters. They had threatened to take me out of OI Division, a skilled billet into 1st Division, an unskilled billet. This threat was finally carried out in July 26, 1978, contrary to the recommendation of the Professional Development Board.

8. Meanwhile, the graffitti of the KKK continued on the ship. Nothing was really done about it. It would appear, be washed off and reappear.

9. Also while in First Division, I was subjected to the same type of demeaning and viturbative action by the command there. I was constantly belittled and insulted. I feel this was because I am an outspoken black sailor.

10. In August, 1978, I began to feel the pressures from the command even greater after I filed suit in the federal district court concerning discrimination against me in rank, rate and job assignment.

11. In August, 1978, I felt that I could no longer take the pressure, so I went to the corpsmen to get some help. I requested hospitalization, but could not get it. The doctor noticed that I was tense and tight and very frustrated.

12. These feelings are the result of continuing harassment on board the U.S.S. Decatur. Lt. Hagstrom, First Division Department Head, confronted me as I was getting paint out of the paint locker. He said, "Hey, I thought you were out of First Division." Lt. Hagstrom knows full well that I am out but he said this just to ridicule and harass me. Also the Captain disrespects me by refusing to salute me or speak to me. These things may seem unimportant but the constant pressure is a difficult thing to deal with.

13. On August 29, 1978, I was seen by Dr. Davis because of my condition. He said that I had an anxiety problem.

14. On September 18, 1978 the pressures were continuing. I was under medication at this time. On that day while I was walking to the aft area on the ship, I suddently passed out and fell to the deck.

15. As a result of this I requested to take six days leave on September 26, 1978 to relieve some of the tension. This was denied by the Commanding Officer on September 28, 1978.

16. On October 3, 1978, I was again seen by Dr. Davis. He said that I suffered from tension headaches and possible diabetes. He "strongly recommended" that I be given leave for at least one week. It was not granted.

17. On October 5, 1978 I requested to be transferred from the U.S.S. Decatur. Conditions there are intolerable for Blacks and I cannot be treated in this way any longer. My health is deteriorating and I cannot take this discriminatory practice and treatment from the command.

18. The fuel tanks on the U.S.S. Decatur are unsafe due to numerous holes. Some of the holes were temporarily fixed with plastic coating.

19. The four strap blowers in Number One fireroom broke down from overheating on October 5, 1978 when the engine was started up.

I declare that the preceding is true and correct under penalty of perjury.

Executed in San Diego, California on October 9, 1978.

/s/_____

VERNON J. WALLACE, JR.

DECLARATION

I, ROBERT LEMONS, depose and say:

1. I am a Black crew member of the U.S.S. Decatur and have been assigned to Engineering Department since November 5, 1977.

2. On August 21, 1978, I filed a complaint in the United States District Court against several officers and non-commissioned officers for discriminatory actions by these persons in violation of my civil and constitutional rights. These violations included being assigned to perform more tasks that I could complete in a normal work day and being harassed when I did not and could not complete them. I was also objecting to the use of discriminatory evaluation.

3. Since that time I have taken part in press conferences, in rallies and in campaigns concerning my case and the bad conditions aboard the U.S.S. Decatur.

4. In July and early part of August, 1978, I was told by Chief McCannon that I would be transferred off of the U.S.S. Decatur. I was told that there were too many petty officers aboard the ship and that I had been selected to be transferred by Lt. Schultz and Chief Lamser.

5. On October 4, 1978, I was notified by the ship's personnel officer, Chief F. Wilde, Jr., that I had received my orders from the Chief of Naval Personnel that I was to be transferred to the U.S.S. Prairie (AD-15).

6. The U.S.S. Decatur was to deploy to duty in the Western Pacific in mid-October, 1978 and I was to be transferred to the U.S.S. Prairie prior to that time.

7. On October 5, 1978, I was ready to check off of the ship. I inquired of Chief Wilde as to my checkout sheet. He said that he was told by the new executive officer, LCDR Young, that I was not to be transferred off of the ship, but instead I was to stay aboard the U.S.S. Decatur.

8. I believe that this is part of the tactics of harassment levied against me by the command because I am Black and have spoken out against the discriminatory practices on the ship. I also feel that this was done to keep me away from my lawyer.

9. I also believe that the U.S.S. Decatur is in exceptionally poor condition and that I should not be forced to go to the Western Pacific with the ship when it leaves. The following unsafe conditions which I personally inspected or learned about show that the ship is a hazard to the crew member. First, on October 4, 1978, I visited the fireroom. I saw that the floating head on the number one boiler was leaking with one hundred pounds per square inch of pressure. The steam has just a great force. It could cut a person in half. A total breakdown on one boiler could cause the ship's engines to breakdown. If this breakdown occurs, I could be injured and the ship stalled in mid-ocean.

Second, on the same day I also noticed that the number one switchboard in main control, number one engineroom, was seriously unstable. It is running at 62 cycles. It should be running at 60 cycles. Normal is 60 cycles. If this condition is allowed to continue, it could cause a serious fire and explosion on the ship. It is a fire hazard.

Third, I spoke to MN3 Renifer on October 3, 1978. He told me that the force draft blower in the main control room was broken down.

They blew steam into the boiler system. If it is not working properly, the steam system would not work. The turbines will not operate. This would, in effect, result in a breakdown of the electrical systems.

Fourth, I checked three life rafts on the U.S.S. Decatur (FR 79, 73 and 71). There were holes in the life rafts.

I declare under penalty of perjury the foregoing is true and correct.

Executed at San Diego, California on October 11, 1978.

/s/ _____
ROBERT LEMONS
by JOHN MURCHO

DECLARATION

I, JOHN MURCKO, depose and say:

1. I am the attorney for Robert Lemons.

2. On or about October 8, 1978 I interviewed Robert Lemons concerning his problems on the U.S.S. Decatur. Because of his duty assignments and the movements of the U.S.S. Decatur, I was not able to get his statement to him before the ship left.

3. However, on October 9, 1978 I did read his statement to him and he agreed that it was true and correct. On October 10, 1978 he authorized me to sign the statement on his behalf.

I declare that the preceeding is true and correct under penalty of perjury. Executed in San Diego, California on October 11, 1978.

/s/ _____

JOHN MURCKO

04 OCT 78

USS DECATUR (DDG-31) at San Diego, CA (UIC 52196) HP: SDiego | 04 OCT 78

AUTHORITY: BUPERS TC B2788/L1 | CIC: AJDJ91S3

	NAME IN FULL	SSN	PAY GRADE RATE AND RMC	CLASS	DEP	AD	TRVL
1	Robert Charles LEMONS	454-74-1259	E-4/EM3 (EM 0000/0300)	USN	1	1	1
2	AND NO OTHERS E-4 with more than 2 years service.						

PROCEED AS DIRECTED AND REPORT TO THE FOLLOWING STATIONS IN THE ORDER NAMED

INTERMEDIATE STATION	NATURE OF DUTY
NONE	
INTERMEDIATE STATION	NATURE OF DUTY
NONE	
INTERMEDIATE STATION	NATURE OF DUTY
NONE	
ULTIMATE DESTINATION: Commanding Officer, USS PRAIRIE (AD-15) HP: San Diego, CA (UIC 04620) ACC 100	NATURE OF DUTY: FOR DUTY

DELAY AUTHORIZED (Computed on leave)	TRAVEL/PROCEED TIME AUTHORIZED	REPORT NOT LATER THAN	
-15- NUMBER OF DAYS	-00PT-00TT- NUMBER OF DAYS	22 October 1978 DATE	0900 HOUR

ADDRESS WHILE ON LEAVE

SUPPLEMENTAL INSTRUCTIONS

SECNAVFLTD NOT REQUIRED
ETOS: 28 AUG 79
LV BAL: +06.5
AUTH 3 MOS ADV PAY
AUTH ADV LV RATE

NEW DUSTA MAILING ADDRESS
USS PRAIRIE (AD-15)
FPO San Francisco 96601

YOU ARE DIRECTED TO REPORT TO THE APPROPRIATE HOUSING REFERRAL OFFICE PRIOR TO NEGOTIATING ANY AGREEMENT FOR OFF BASE HOUSING - NAVY LODGE INFORMATION PROVIDED

F. WILDE JR, PNC, USN, PERSOFFSYDIRCO

APPROPRIATE CHARGEABLE AND APPLICABLE ACCOUNTING DATA FOR TRAVEL AND PCS ITEM EXPENSES INCURRED

TAC	APPROPRIATION SYMBOL AND SUBHEAD	CLASS CODE	BUREAU CONT. NO.	SUB. AUTH. RATE	AUTH. ACCTG. ACTIVITY	TYPE (OPTAR)	PROP. ACCTG. ACTIVITY	COST CODE
PCS ACCOUNTING DATA								
HDJ9	1791453.2252			E	00C022	AJ	DJ9/1/S/3	DJ94547412S9
TEMPORARY PER DIEM ACCOUNTING DATA								

ENTER FOLLOWING IN FISCAL DATA SECTION OF TRANSPORTATION REQUEST FROM PCS ACCOUNTING DATA

COST	SAME AS ABOVE	SGI	LEAVE BLANK	SAME AS ABOVE	SAME AS ABOVE	SAME AS ABOVE	ENTER AS ABOVE AS TRAVEL ORDERS NO.	SAME AS ABOVE

THE FOLLOWING TRANSPORTATION IS AUTHORIZED

[X] GOVERNMENT [ ] COMMERCIAL [X] BY PRIVATELY OWNED VEHICLE [ ] OTHER

TRAVEL INDICATED IS DIRECTED

[ ] GOVT AIRCRAFT (If Navy available) [ ] COMMERCIAL	PRIORITY	FROM	TO

DISBURSING OFFICER IS HEREBY AUTHORIZED AND DIRECTED TO FURNISH SUCH TRANSPORTATION/SUBSISTENCE AS MAY BE REQUIRED IN THE EXECUTION OF THESE ORDERS

TRANSFER CODE NO.	AUTHENTICATING SIGNATURE	RANK	TITLE
0730, 06 OCT 78	F. WILDE JR	PNC, USN	PERSOFFSYDIRCO

I HAVE READ AND UNDERSTAND THESE ORDERS AND INSTRUCTIONS AND I HAVE RECEIVED THE RECORDS AND ACCOUNTS AS INDICATED.

SIGNATURE OF TRAVELER OR SENIOR IN CHARGE: Robert Charles Lemons

DELIVERED/NOTIFIED 040CT78 "SUPPORT YOUR LOCAL RECRUITER" Call the Navy Recruiting Command's toll free number 800-841-8000

Exhibit "D"

Standard Form 513
General Services Administration and
Interagency Committee on Medical Records
GSA FPMR (41 CFR) 101-11.8
October 1975

CLINICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO: Psychiatry Bldg 36-4 | FROM: (Requesting ward, unit, or activity) USN STA | DATE OF REQUEST 8 Oct 1978

REASON FOR REQUEST (Complaints and findings)

Please evaluate this 21 yr old black male re: situational concern as a reason for his anxiety. No hospital or outpatient psychiatric history.

PROVISIONAL DIAGNOSIS

Situational Anxiety

DOCTOR'S SIGNATURE | APPROVED | PLACE OF CONSULTATION ☐ BEDSIDE ☐ ON CALL | ☐ EMERGENCY ☑ ROUTINE

CONSULTATION REPORT

I saw this 21 y/o SN, in service N 2 yrs on 4 yr. enlist on present ship 18 mo & it is his understanding he will be there for the remainder of his tour. He feels there is unnecessary bickering among his shipmates & feels in part this may be due to ethnic differences. He wishes this were different, but does not know how to help effect such subtle changes, & says he has felt a sense of frustration. Nonetheless he is looking forward to fulfilling his military obligations & to eventually going to college.

SN Wallace is an alert, cooperative, well-groomed, nearly-adult young man who is fully oriented & coherent w/ intact sensorium & at least average intellect, & who denies any depressive intent. There is no evidence of any thought disorder. His affect is full, flexible, & appropriate. He certainly seems concerned w/ life aboard ship, but his mood does not seem remarkable for depression @ this time.

Impression: No psychiatric dx. I of course do not say my views fully understand his grievances w/ respect to his ship, & so I have mentioned he seems markedly concerned w/ them. This sort of thing is not to be considered (i.e., his concern & grievances) psychiatric illness.

Thank you for letting me see [illegible] on Yeoman 2nd interview by my team.

SIGNATURE AND TITLE | DATE | IDENTIFICATION NO. | ORGANIZATION

[illegible] Psychiatrist MC USNR

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WALLACE, VERNON J.
SN USN 465-13-2185
USS DECATUR (DDG-31)

REGISTER NO. # 233-2966 | WARD NO. 29-B

S/N 0105-LF-201-2602

CONSULTATION SHEET
Standard Form 513
513-105-07

Exhibit 7

Standard Form 513
General Services Administration and
[illegible] Committee on Medical Records
[illegible]
[illegible]

CLINICAL RECORD — CONSULTATION SHEET

REQUEST

TO:	FROM: (Requesting ward, unit, or activity)	DATE OF REQUEST
NAVSTA/BEC CLINIC S. DIEGO.	USS DECATUR (DD 936-31)	28 Aug 78

REASON FOR REQUEST (Complaints and findings)

2.1 y/o Negro CS [illegible] to s/c c complaint of anxiety and tension aboard ship (core strength). Says he [illegible] Law suit against several officers aboard this command and apparently have been [illegible] not requested for several days [illegible] pathway [illegible] Falls. Since appears very relaxed when seen out of sight & friends but apparently is experiencing work anxiety ?? was explained hospitalization on above request is not authorized. Request c see M.O. for possible Rx.

PROVISIONAL DIAGNOSIS

Situational Maladjustment

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
[signature]		☐ BEDSIDE ☐ ON CALL	☐ EMERGENCY ☒ ROUTINE

CONSULTATION REPORT

T 98.8 BP 120/60

Referred @ 1330 on 29 Aug 78

[signature]

c.c. Patient feels just because he and 4 others have instituted suit against their superior officers for harassment etc. he feels Tight and tense because of conditions

He is alert and aware. and has no evidence of thought defect or personality defect.

(Continued on reverse side)

SIGNATURE AND TITLE	DATE	IDENTIFICATION NO.	ORGANIZATION

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)	REGISTER NO.	WARD NO.
WALLACE. Vernon. F. SN USN 465-18-2185 USS DECATUR (DD 936-31)		

S/N 0105-LF-301-3502 CONSULTATION SHEET Standard Form 513 513—105—82

Exhibit "F"

35

He exhibits signs of frustration with his lot and strikes he cries without reason at times. He comes from a family of three who parents were divorced 10 yrs ago. He finished High School and joined Navy after graduation.

He is being referred to Psychiatry for clearance to exclude psychosis.

Philip B. Mitchell

Standard Form 513

CLINICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO: Medical Officer	FROM: (Requesting ward, unit, or activity)	DATE OF REQUEST
NAVSTABRCLINIC, San Diego	USS DECATUR (DDG-31)	22SEP78 ~~23SEPT78~~

REASON FOR REQUEST (Complaints and findings)

(1) 21 y/o ♂ reported to SL
states to be seen Dr. Davis this morning & U.R.
was directed to return to ship to pick up slip.
Slip was stopped by sickbay because pt complained of
tension in back of neck and HA. appears pt has a
tension aboard ship. Please examine & advise.
(2) Pt. returning to ship as per C.O.'s. advise due to
H.A.'s. Slip was requested by LT as recommended

PROVISIONAL DIAGNOSIS

Tension head ache

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
R. HERNANDEZ, HMC		☐ BEDSIDE ☐ ON CALL	☐ EMERGENCY ☒ ROUTINE

CONSULTATION REPORT

by Dr. DAVIS: Due to 30 days LV this year and apparently
due to work load present request was denied. Pt returned
back to sickbay for Rest of H.A.'s. Request Rx could I have
advised pt to cut present Rx of Relafen given for H.A.'s. Pt
quit taking same because he didn't like the way it made
him feel.

T 98.9 BP 102/58

SAN DIEGO, CA

Has ca noted before + seen 18 Sept 78
Patient examined + found to
suffer from tension headache, also +
Hx exam to Rs diabetes. At this time
Strongly recommend patient be allowed
take ajard leave for at least one week
under these circumstances and with this
(Continued on reverse side) Authority

SIGNATURE AND TITLE	DATE	IDENTIFICATION NO.	ORGANIZATION
[illegible] LT USN	18 Sep 78		

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)	REGISTER NO.	WARD NO.
WALLACE, Vernon, J. SN, USN 465-13-2185 USS DECATUR (DDG-31)		

S/N 0105-LF-301-3502 CONSULTATION SHEET
Standard Form 513
513-109-02

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DECLARATION

I, JOHN MURCKO, depose and say:

1. I am an attorney authorized to practice in the state and federal courts in the State of California.

2. On or about October 2, 1977, I spoke to Lt. Gary Elkins, Naval Litigation, Bureau of Naval Personnel, Washington, D.C. I asked him to request of the Chief of Naval Personnel that my five clients, Vernon Wallace, Robert Lemons, George Shannon, Cornelius Hickey, and James Richardson, be permitted to stay in San Diego, California while the U.S.S. Decatur was deployed for duty in the Western Pacific from mid-October, 1978 to mid-April, 1979. I told him that this was necessary to enable us to prepare for the case which would be heard in six to twelve months. Also I told him that my clients were being intimidated, mistreated and harassed by the command on the U.S.S. Decatur and it would be in the interests of both the Navy and my clients if they could be transferred off of the ship pending determination of the action.

3. On October 6, 1978, I was notified by Lt. Gary Elkins that the Chief of Naval Personnel denied requests for transfer of my clients off of the Decatur which I had made on October 2, 1978.

4. I spoke to my client Cornelius Hickey on October 9, 1978. He notified me that his department head, Lieutenant Barron Bianco, had threatened to transfer him from Supply Department to First Division, Deck One, where he would probably be involved in chipping paint and cleaning decks. This is in violation of naval regulations OPNAV Instruction 5354.1A, Chapter II, Sections 5 and 8 which require equality of treatment for minority personnel and that racial, ethnic, and cultural or national factors should not be considered in duty assignments.

4. By making these threats to transfer plaintiff Hickey, defendant Bianco is violating naval regulations because he is using racial factors in determining who to transfer to less desirable duty assignments. Duty in First Division is the least desirable on the ship.

I declare that the preceding is true under penalty of perjury. Executed at San Diego, California on October 11, 1978.

/s/ _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 78-579-N

Filed January 2, 1979

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDON, FMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR AN ORDER GRANTING SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiffs' claims are not very complex. Plaintiffs are all Black Americans who enlisted in the United States Navy and are currently assigned to Weapons Department, Supply Department and Engineering Department aboard the U.S.S. Decatur (DDG 31). The command of the U.S.S. Decatur is made up essentially of the defendants who are all Anglo American or white officers. The plaintiffs are being discriminated against in their job assignments, in the schools they can attend, in the treatment at Non-Judicial Punishment, in their quarterly marks and in the skilled rates because they are Black.

Defendants committed these acts against the plaintiffs in violation of their Constitutional civil rights in an effort to

keep plaintiffs in the unskilled ratings in the United States Navy, in the most dangerous and dirtiest assignments, in the most unpleasant surroundings, out of schools where it is possible to advance, out of the advanced rates and in a condition of servitude and dependency. Plaintiffs are also discriminated against at Captains Masts, in evaluations and by being processed for discharge. As a result of defendants' malicious and discriminatory acts, plaintiffs will not be able to develop careers in the Navy and will suffer once they are discharged. Plaintiffs seek money damages from defendants, a declaratory action stating their rights, and injunctive relief against continued discrimination.

Plaintiffs request leave to amend the complaint, pursuant to Rule 7 and Rule 15 of the Federal Rules of Civil Procedure to allege a cause of action against the defendants pursuant to 42 U.S.C. 1981, for discriminatory violation of their contract.

The defendants have filed a motion to dismiss. The bases are lack of jurisdiction (discriminatory acts of military officials are not reviewable, a servicemember cannot sue another servicemember), failure to exhaust administrative remedies, and immunity from suit. The defendants have also filed a motion for a summary judgment based on ten affidavits that purport to show a lack of discrimination.

I

THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER SUITS BY SERVICEMEMBERS WHERE THEIR CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY OTHER SERVICEMEMBERS.

A. Discretionary Military Decisions Involving Violation of Constitutional Rights Are Subject to Review.

Actions by military commanders who abuse their discretion and violate constitutional rights of their subordinates are answerable in federal actions. *Dinsman v. Wilkes*, 12 How. 389, 53 U.S. 414 (1851); *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978); *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1975).

The cases cited by the defendants are not applicable. They involved solely the exercise of command discretion

without the violation of constitutional rights. *(Orloff v. Willoughby*, 345 U.S. 38—improperly assigning duties during wartime; *Arnheiter v. Chaffee*, 435 F.2d 691—relieving an officer of command of a ship during wartime; *Keister v. Resor*, 462 F.2d 471—activation of reservists during wartime).

B. A Serviceman May Sue Another For Violation of His Constitutional Rights.

It must be made perfectly clear that this is not an action for negligence on the part of the defendants. This is an action against defendants for violation of the constitutional equal protection and due process rights of the plaintiff by failure to follow the Constitution, statutes and naval regulations dealing with job assignments, schooling, punishment, discharge and mistreatment of Blacks because of race, color and nationality.

The Supreme Court has held in numerous cases that the federal district court has jurisdiction to hear suits and claims brought by members of the military against other members of the military when their constitutional rights have been violated. This includes violations of Fifth Amendment and Sixth Amendment rights at a court-martial. *Burns v. Wilson*, 346 U.S. 137 (1953) (denial of Sixth Amendment right to counsel, due process rights of a fair trial, of a forced confession, of manufactured evidence, and of coerced witnesses); *O'Callahan v. Parker*, 395 U.S. 258 (1969) (denial of Fifth Amendment right to indictment by a grand jury and Sixth Amendment right to a jury trial); *Relford v. Commandant*, 401 U.S. 355 (1971) (denial of right to jury trial); *Noyd v. Bond*, 395 U.S. 683 (1969) (denial of due process by failing to follow federal statutes and military regulations in post-court-martial review actions), *Daigle v. Warner*, 390 F.2d 358 (9th Cir. 1974) (denial of right to attorney at a summary court-martial); *Mitchell v. Swope*, 224 F.2d 365 (9th Cir. 1977) (right to counsel); *Kaufman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969) (denial of right against self-incrimination and right to cross-examine witnesses); *United States v. Augenblick*, 393 U.S. 348 (1969).

Federal courts also have jurisdiction in suits by members of the military against their commanding officers for violation of their rights against unreasonable searches and seizures guaranteed by the Fourth Amendment. *Committee fore GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975) ("We recognize, of course that GIs are entitled to the protection of the Fourth Amendment as are all other American citizens."); *Kaufmann v. Secretary of the Air Force*, 415 F.2d 991, 996 (D.Cir. 1969).

Jurisdiction also exists for suits by military personnel against their superiors for violation of their rights to freedom of speech and press guaranteed by the First Amendment. *Parker v. Levy*, 417 U.S. 733 (1974) (prohibiting the making of statements to other enlisted personnel concerning the Vietnam War); *Secretary of the Navy v. Averech*, 418 U.S. 676 (1974) (prohibiting the distribution of literature to enlisted people); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1974) (right to have posters in barracks); *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978) (Marine Corps enlisted enjoined their superior from prohibiting their distribution of petitions to Congress on the military base); *Cortright v. Resor*, 325 F. Supp. 797 (E.D.N.Y. 1971) *rev'd on other grounds*, 447 F.2d 245 (2nd Cir. 1971) *cert. denied* 405 U.S. 965 (1972) (signing and circulating petitions); *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970) *cert. denied* 401 U.S. 982 (1971) (distribution of literature on base); *Dash v. Commanding General*, 307 F. Supp. 849 (1969) *aff'd per curiam* 429 F.2d 427 (4th Cir. 1970) *cert. denied* 401 U.S. 981 (1971) (holding an open meeting on base).

In *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978) the Court of Appeals in this circuit held that enlisted members of a naval vessel may bring an action in federal district court against their commanding officer when the latter denied them the right to distribute a petition and attempted to solicit signatures on a petition which was intended for Congress. Jurisdiction was held to exist on the basis of 28 U.S.C. 1331 and 10 U.S.C. 1034. The court held that the Navy did not have the right to "require a system of

prior restraints" in circulating petitions to Congress. Damages were allowed in that action.

Military personnel also can bring actions against their commanders for violations of their First Amendment right to be free of the attempts of the military to establish a religion. *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1971) (illegal to require servicemen to attend church services).

The court in *Cortright v. Resor*, 447 F.2d 245, 254-5, stated:

> "We are far from holding that under no circumstances could a civilian court interfere with a transfer order or prescribe other relief if that were needed to prevent abridgment of a soldier's first amendment rights."

See also, *Friedman v. Froehlke*, 470 F.2d 13511 (1st Cir. 1972); *Hugh v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973) (denial of right to wear wig by commanding officer is arbitrary, irrational and unreasonable action).

The federal courts have recognized jurisdiction of suits by military personnel against their military superiors for violations of due process rights of servicemen at administrative hearings. *Hagopian v. Knowlton*, 470 F.2d 201 (2nd Cir. 1972) (denial of right to hearing); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967) (same); *VanderMolen v. Stetson*, 471 F.2d 617 (D.C. Cir. 1977) (denial of right to attorney, to notice, to call and to cross-examination of witnesses); *Grimm v. Brown*, 449 F.2d 654 (9th Cir. 1971) (denial of a "fair and impartial hearing"). Jurisdiction also exists when Navy officials fail to comply with their own regulations. *Kimball v. Commandant, Twelfth Naval District*, 423 F.2d 88 (9th Cir. 1970) (hardship discharge); *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970) (denial of deferment); *United States ex rel Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Feliciano v. Laird*, 426 F.2d 424 (2nd Cir. 1971); *Nixon v. Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1972 (5th Cir. 1972).

Finally, we come to violations of equal protection as they are embodied in the due process clause of the Fifth Amendment. The United States Supreme Court held that jurisdic-

tion exists in a suit by a naval lieutenant against his superiors concerning denial of due process and equal protection guarantees by failure to promote officers. The court had jurisdiction and decided the issue of equality of treatment by sex in an issue concerning members of the military. *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

But even more important, in *Alvarez v. Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977) the court held that a black naval lieutenant can sue his naval superiors in an action for damages where the complaint alleged violation of constitutional rights under the Fifth Amendment for racial discrimination. The court stated:

> "The complaint alleges that defendants unlawfully deprived plaintiff of liberty without due process of law when they hospitalized him without a hearing or other safeguard or procedural due process for five days. Alvarez also claims that the various defendants all discriminated against him on the basis of race, and this is the more important allegation. The due process clause of the Fifth Amendment clearly embraces principles of equal protection of law guaranteed by the Fourteenth Amendment. *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). And intentional discriminatory conduct by federal officials, regardless of the fairness of the laws under which they act, constitutes a violation of the concept of equal protection of law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). There can be no question that Alvarez's complaint alleges deprivation of federally protected rights.
>
> The remaining question is the power of the court to shape a remedy in money damages. Recognizing that damages is the traditional legal remedy, this court recently held that money damages are appropriate in an action against city officers and the City of Chicago for an unlawful arrest and confinement arising under the due process clause of the Fourteenth Amendment. *Williams v. Brown*, 398 F. Supp. 155 (N.D. Ill. 1975). The *Williams* case is clearly apposite with respect to plaintiff's allegations that the hospitalization deprived

him of liberty without due process of law. Money damages are also appropriate to redress racial discrimination. Several courts have held that damages are available in racial discrimination cases brought against private citizens and state officials under § 1981, § 1972, and § 1983. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *McCrary v. Runyon*, 515 F.2d 1082 *aff'd., Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). In *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974), the court held that defendant was subject to an action for damages directly under the Fourteenth Amendment for allegations of racial discrimination. There is no reason to deny compensatory and punitive damages for the same substantive constitutional violation in an action against federal officials brought directly under the due process clause of the Fifth Amendment. *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1157 (4th Cir. 1974).
...[D]efendant naval officers are subject to a damage action under the Fifth Amendment ..."

Authority is legion for the proposition that federal courts have jurisdiction over suits by military personnel against their officers for violation of their constitutional rights and to obtain relief by way of injunction, declaratory judgment, mandamus and also damages.

In this case, the defendants violated plaintiffs' constitutional rights to due process and equal protection in three regards. First, and most important, they denied plaintiff WALLACE equal opportunity to a skilled position in the United States Navy, to training and to advancement, solely because of his race, color and national origin. They denied plaintiff LEMONS equal opportunity to take the examination for second class petty officer and gave him a low evaluation solely because of his race, color and national origin. They denied plaintiffs HICKEY and RICHARDSON opportunity to advance in rate by denying them the opportunity to attend record school or the opportunity to work as a record clerk solely because of their race, color and national origin. They also denied plaintiff SHANNON the right to be free from physical threats and abuse, and the equal opportunity to obtain evaluations and a discharge commensu-

rate with his performance, solely because of his race, color, and national origin. This type of discrimination is a violation of the equal protection clause to the United States Constitution as the United States Supreme Court has held in numerous cases to be unlawful. Many suits have been brought against government officials to enjoin them from discrimination and to correct invasions of constitutional rights. See, *Ex Parte Young*, 209 U.S. 123 (1908); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill., 1975); *Douglas v. Hampton*, 532 F.2d 976 (D.C. Cir. 1975).

Second, the defendants also violated federal statute by conspiracy to deprive plaintiffs of their civil rights because of their race and color in violation of 42 U.S.C. 1985.

Third, the defendants also violated naval regulations regarding race relations and discriminatory treatment which is a further violation of due process and has been so held in *Alvarez v. Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977).

The defendants allege that plaintiff's action is barred by the doctrine that a military personnel cannot sue his superior. However, the main part of defendants' points and authorities is directed to the proposition that "a soldier [cannot] recover for *negligence either* against *his superiors* or the government he is serving." See, page six. The main authorities cited are *Feres v. United States*, 340 U.S. 135; *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666; *Bailey v. Van Buskirk*, 345 F.2d 298 and *Hass v. United States*, 518 F.2d 1138. But all of these cases are not applicable here. Most of them are actions for claims filed under the Federal Tort Claims Act. They are for negligence resulting from acts of their superiors. They do not involve intentional violation of constitutional rights. The action here does not involve negligence at all or a claim under the Federal Tort Claims Act. It concerns constitutional rights that a person cannot be discriminated against because of race, color or nationality. A war was fought over this right. Millions of people died for the freedom of black people. Are we to cast that all aside today? None of the cases cited by defendant are binding here where the sole consideration is violation of constitutional and statutory rights.

II

THE DOCTRINE OF SOVEREIGN IMMUNITY IS NOT APPLICABLE IN THIS CASE

There is no question but that there is a doctrine of immunity and that a leading case on the issue is *Barr* v. *Matteo*, 360 U.S. 564 (1959). It is important, however, to read *Barr* in the light of its own express qualification; it decided "the law of privilege as a defense by officers of government to civil damage suits *for defamation and kindred torts....*" [Emphasis added]. 360 U.S. at 569. That *Barr* is a free speech case and that the executive privilege afforded in *Barr* was likened to that under the Constitution for members of both Houses of Congress for a speech, debate, vote, report or action done in session is clear. 360 U.S. at 569. Nothing in *Barr* can be construed to continuance with impunity occasional deprivations of due process of law or the right to a hearing or a straying from set rules and regulations in the name of expediency or ease of administration.

The purpose of sovereign immunity is to prohibit suits against the government which deplete the government's funds or affects the officer in the exercise of his official functions. *In re Ayers*, 123 U.S. 443 (887); *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).

There are two major exceptions to the rule. The doctrine of total immunity does not apply if the officer's official actions were not those sanctioned by the government. In other words if his actions were beyond his authority or violated the Constitution, they are not immune from suit. *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949).

> "[W]here the [federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689.

Bowers v. *Campbell*, 505 F.2d 1155, 1158 (9th Cir. 1974).

Similarly in *Dugon* v. *Clark*, 372 U.S. 609, 621-33 (1963), the Supreme Court noted the rule of sovereign immunity, then stated the exceptions:

> "Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void.... In either of such cases the officer's action 'can be made the basis of the suit for specific relief against the officer as an individual....'"

More recently, the Supreme Court again addressed itself to the question of immunity in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). *Scheuer* was a 1983 civil rights action by representatives of Kent State University students, who had been shot and killed by Ohio National Guardsmen on the Kent campus, against the Governor of Ohio, senior and subordinate officers and enlisted personnel of the Ohio National Guard and the President of the University. The court held that the immunity it had granted in *Barr* and indeed any grant of immunity, was by no means absolute. The very purpose of *Monroe* v. *Pape*, 365 U.S. 167 (1961) and the Civil Rights Acts themselves, held the court, was "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." The *Monroe* court expressly stated that through the civil rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. 365 U.S. at 171-172. See also, *Scheuer* v. *Rhodes*, 416 U.S. at 243. See also, *Andros* v. *Rupp*, 433 F.2d 70, 72-3 (9th Cir. 1970); *Washington* v. *Udall*, 417 F.2d 1310, 1313-16 (9th Cir. 1969).

In the most recent case in the Ninth Circuit, *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1955), the issue of sovereign immunity was raised. The plaintiff, a federal civilian employee of the United States Naval Air Station in Alameda, California, brought suits against federal naval officers on the basis that her removal from a trainee position, denial of later promotions, harassment and reprimands were

based on racial discrimination. The action was based on 42 U.S.C. 1981 and 28 U.S.C. 1343(4). The court held:

> "Sovereign immunity poses no jurisdictional bar to Bowers' action against the named NAS officials. If Bowers eventually prevails on her section 1981 claim, it will be because the federal officials have engaged in racially discriminatory employment practices that are forbidden by that section. '[W]here the [federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'"

The court found that racially discriminatory employment decisions by federal officials were *ultra vires* their authority as limited by 42 U.S.C. 1981.

In *Penn* v. *Schlesinger*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), black federal employees suing on behalf of themselves and similarly situated blacks in Alabama, alleged a cause of action under 42 U.S.C. 1981 because seventeen federal agencies in the State maintained racially discriminatory promotion and advancement practices. The court held that section 1981 prohibited discriminatory acts by federal officials. It also held that a violation of section 1981 by a federal official was an *ultra vires* act for which he is personally liable and the action is not barred by sovereign immunity.

Also in *Alvarez* v. *Wilson*, 431 F.Supp. 136 (N.D. Ill. 1977), a naval lieutenant sued his superior officers individually for racial discrimination in removing him from his job in race relations and unlawfully depriving him of liberty. The action was based on the *Bivens* case, 42 U.S.C. 1985 and 28 U.S.C. 1331. The court held that naval officers are subject to a damage action by another member of the Navy for actions under the Fifth Amendment. Sovereign immunity does not bar this type of suit.

The same exception is applicable here. The defendants do not enjoy sovereign immunity. Their actions were violations of the equal protection clause, federal statutes, and naval regulations outlawing discrimination. Their actions were also *ultra vires*. This case is controlled by the *Larson-Dugon* doctrine and by the *Bowers* case.

III

THE DEFENDANTS DO NOT ENJOY OFFICIAL IMMUNITY FOR LIABILITY FOR MONEY DAMAGES

It must be remembered that the plaintiffs' position is that the defendants' acts were outside the scope of statutory authority, naval regulations and constitutional authority. Further, the defendants acted outside the scope of their duties and abused their discretion in the racially motivated treatment of the plaintiffs.

The defendants are not shielded from liability for this opprobrious racial conduct and violation of constitutional and civil rights. *Bivens*, the Fifth Amendment to the United States Constitution and the Civil Rights Acts are applicable to federal officials.

There is no absolute immunity. The qualified immunity available is as the court of Schever defined (416 U.S. at 247-248):

> "...[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

There is nothing sacrosanct about the military that renders constitutional violations by the Navy remediless. In *Konn* v. *Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972), although the remedy there was mandamus, the court expressly held that:

> "It has long been recognized that the failure of the Army to follow its own regulations is a violation of due process...."

And where a violation of due process has resulted, courts have *long* upheld the right of a member of the military to an award of monetary relief against a commanding officer.

Dinsman v. *Wilkes*, 12 How. 389, 53 U.S. 414 (1851) was "an action by a marine against his commanding officer for punishment inflicted upon him for refusing to do duty in a foreign port upon the ground that the time of his enlistment had expired, and that he was entitled to his discharge." The marine had apparently been beaten and imprisoned. Noting that "the case is one of much delicacy and importance as regards our naval service," the court held as to the liability of the commanding officer at 427:

> "For acts beyond his jurisdiction, or attended with circumstances of excessive severity, arising from ill-will or a depraved disposition, or vindictive feeling, he can claim no exemption."

The court went on to add at some length (53 U.S. at 429-30):

> "It was the duty of Captain Wilkes to maintain proper discipline and order among the officers and men under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continued refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience, or necessary as an example to deter others from a like offense, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.[1]
>
> But, on the other hand, he was equally bound to respect and protect the right of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time conscientiously believed to be nec-

[1] Counsel apologizes for the lengthy quotation but feels that the historical importance of *Dinsman* in the context of the issues in this case warrants such treatment.

essary to maintain discipline and due subordination in his ships. The most despotic powers with which law clothes him, for the time, and which are aboslutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him. For, in such a case he would be liable whatever were his motives. But the facts to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

If they believed, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover."

See also, *Nixon* v. *Reeves*, 65 Minn. 159, 67 N.W. 989 (1896), and the analysis contained in *Crozman* v. *Callahan*, 136 F.Supp. 466 (D.C. Okla. 1955). Admittedly, there are a few cases in point, but those that are, point to liability.

The court in *Alvarez* v. *Wilson*, 431 F.Supp. 136, 145, weighed the two positions of absolute immunity of military officers versus protection of constitutional rights of black national minorities. The court stated that military personnel must be free to make decisions to carry out the mission of common defense. But it looked to the objective conditions. They were peacetime activity and lack of any wartime decisions. The court most aware of the great deprivation of rights that black people in this country suffer because of the racial and national discrimination stated:

> "No citation is needed to illustrate that a person who endures racial discrimination suffers a most serious deprivation of constitutional rights. We can think of no military purpose—either of discipline, nor order, nor readiness for combat—that would justify absolute immunity for racially discriminatory acts perpetrated by military officers." *Id.* at 146.

The court went on to hold that the defendants had a right to qualified immunity. That means if they were acting in good faith when they did the acts, then they are immune from civil liability.

> "The elements of good faith defense are that the defendants subjectively believed in good faith that their conduct was lawful, and that their belief was reasonable. The defendants' subjective state of mind and their motivations, then, are material facts. Generally, summary judgment is an inappropriate tool to determine these facts. It is difficult enough to reconstruct subjective motivations two years after the occurrence with the benefit of live witnesses who can be cross-examined. When there are conflicting affidavits which raise factual questions, it is impossible to do it by affidavit. *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 989 n.13, 47 L.Ed.2d 128 (1976); *Foster* v. *Zeeko*, 540 F.2d 1310 (7th Cir. 1976)...." *Id.* at 147.

The United States Supreme Court has recently held that

> "The single submission by the United States on behalf of the petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitution-

> al rights and even if the violations were knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it." *Butz* v. *Economou*, 46 U.S.L.W. 4952, 4954 (1978).

The same considerations are applicable here. One must concede that the defendants occupy positions which require the exercise of discretion. They do not perform only ministerial tasks. They do occupy positions of great responsibility which should command great respect, but for that reason, as the Supreme Court in *Dinsman* stated, "it is more especially his duty not to abuse it." 53 U.S. at 429.

The test of immunity is not simply that the defendants were in high places. All of the defendants were duty bound to follow federal statutes and naval regulations and not to abuse a person's constitutional rights, and in that respect, they would be hard-pressed to contend that they had the discretion to do otherwise.

Section 0702 of the Navy Regulations, 1973, expressly limits naval officers' discretion to that within the law and the rules and regulations of the Navy.

Likewise, naval regulations provide that there shall be no discrimination against members of the Navy on the basis of race, color, sex or national origin. OPNAVINST 1500.42A and OPNAVINST 5354.1.

The defendants knew that they had no basis to deny equal opportunity to jobs, to schools, to training, etc. to plaintiffs. In fact, they had every reason to know that they were required to provide equal treatment to the plaintiffs. Further, the defendants believed that they could teach plaintiffs a lesson through the use and abuse of their power. The naval regulations do not say that a naval person *may* not discriminate against a national minority. It states that they *shall* not discriminate. It is mandatory and failure to follow the regulations was a violation of due process, a violation of naval regulations and an abuse of the command functions and plaintiff's rights.

In addition, *Dinsman* indicates that there is liability where acts within a commanding officer's discretion are performed but are motivated by ill-will or malice. The ill-

will of the defendants is apparent from this abbreviated record.

The only defense that the defendants have is a qualified immunity which is akin to a claim of good faith. A motion to dismiss is not the proper basis for resolving this issue. It must be resolved by a trial on the merits.

IV

PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND HAVE NO FURTHER ADEQUATE REMEDY

As a general rule of law, administrative remedies provided by the military service must be exhausted prior to seeking relief in civil courts. *McGee* v. *United States*, 402 U.S. 479 (1971); *Sohm* v. *Fowler*, 365 U.S. 915 (1966). The reasons for requiring exhaustion are: (1) to prevent interference by the courts in matters which require the exercise of agency expertise, (2) to insure proper functioning of the Congressional administrative system, (3) to assure judicial efficiency. However, this doctrine is not inflexible and when the reasons supporting the doctrine are found inapplicable, the doctrine should not be applied blindly.

> "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an Administrative Board. Mrs. Downen's complaint rests solely upon the resolution of her constitutional claim. Accordingly, Mrs. Downen was not barred from District Court through her failure to exhaust administrative remedies." *Downen* v. *Warner*, 481 F.2d 642, 645 (9th Cir. 1973).

First, defendants claim that plaintiffs have not filed a claim under Article 138. The law in this circuit is that where constitutional issues are involved, Article 138 remedies do not have to be exhausted. The courts are best equipped to handle constitutional issues. *Daigle* v. *Warner*, 490 F.2d 358 (9th Cir. 1973). See also, *Committee For GI Rights* v. *Callaway*, 518 F.2d 466 (5th Cir. 1975).

Second, the defendants contend that plaintiffs have not exhausted their remedies before the Board for the Correction of Naval Records. Defendants have not read the com-

plaint where it states that they have exhausted their administrative remedies. See page 16 of complaint. See also, Exhibits "A" and "B" attached hereto, which show that exhaustion is complete.

Third, defendants allege another remedy—under naval regulations—was not exhausted. Naval regulations provide four possible remedies. One is an action under Article 138; another is the Board for the Correction of Naval Records. The third is a request to a Congressman and the last is a complaint via the chain of command. See, OPNAVINST 5354.1A, Chapter IV(2). The first two have been complied with. See Exhibits "C" and "D" attached hereto and incorporated by reference. No answer has been received.

All remedies have been exhausted. It is time to have judicial review since it is constitutional issues that are involved here. They are violations of equal protection and of due process. Military officials are not expert in deciding constitutional issues, but they have had much experience in ignoring these rights. We must not allow this doctrine to stand in the way of resolution of these issues.

V

PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF

A. Plaintiffs Have Stated a Claim Under 42 U.S.C. 1985.

The fourth argument of the defendants is that the complaint fails to state a claim under 42 U.S.C. 1985 because it is not adequate to allege a conspiracy in general allegations.

The law concerning motions to dismiss for failure to state a valid claim under Rule 12 of the Federal Rules of Civil Procedure is quite clear:

> "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim...."

Des Isles v. *Evans*, 200 F.2d 614, 615 (5th Cir., 1954); *Millet* v. *Godchaux Sugars, Inc.*, 241 F.2d 264, 265 (5th Cir. 1957).

Actions under 42 U.S.C. 1985(b) must set out facts on which to base a claim that a constitutional right was violated. *Kamsler* v. *Zaslawsky*, 355 F.2d 526 (7th Cir. 1966). In *Baldwin* v. *Morgan*, 251 F.2d 780 (5th Cir. 1958), the court held that an allegation in a complaint that an order had been issued by the Public Service Commission and that custom and usage of compelling segregation existed, was a sufficient statement of facts under 42 U.S.C. 1985.

A plaintiff charging violation of his civil rights by a conspiracy is not required to list the place and date of defendants' meetings and a summarization of their conversations. It is not required that the evidence be pled. *Hoffman* v. *Halden*, 268 F.2d 280 (9th Cir. 1959). All that is required is a short and plain statement showing that the pleader is entitled to relief so as to avoid its dismissal., *Cocoran* v. *Yorty*,, 347 F.2d 222 (9th Cir. 1965) *cert. denied* 382 U.S. 966 (1966).

The landmark case involving 42 U.S.C. 1985 (3) is *Criffin* v. *Breckenridge*, 403 U.S. 88 (1971). There, the black plaintiffs alleged that the private white defendants had stopped the plaintiff's automobile on a public highway and had detained and had beaten them and their purpose was "to prevent said plaintiffs and other Negro Americans ... from seeking the equal protection of the laws and from enjoying the equal right, privileges and immunities of citizens under the laws." The Supreme Court in an opinion by Justice Stewart, found:

> "The complaint in this case alleged that the petitioners were traveling upon the federal, state and local highways in and about De Kalb, Kemper County, Mississippi. Kemper County is on the Mississippi-Alabama border. One of the results of the conspiracy, according to the complaint, was to prevent the petitioners and other Negroes from exercising their rights to travel the public highways without restraint in the same terms as the white citizens in Kemper County, Mississippi. Finally, the conspiracy was alleged to have been inspired by the respondents' erroneous belief that [the owner and driver of plaintiff's car] a Tennesseean was a worker for Negro civil rights. *Under these allegations it is open to the petitioners to*

> *prove at trial that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy* ... and had suffered from conduct that Congress may reach under its power to protect the right of interstate travel. 403 U.S. at 105-06.

The allegations in the plaintiffs' complaint are not unsimilar to the pleading of the facts in *Griffin* v. *Breckenridge, supra.* The 1985 claim does not merely "allege that the defendants 'conspired to deprive plaintiff of his right under the Constitution and laws' of the United States in violation of 42 U.S.C. Section 1985." See page 10 of defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss. Instead, it is preceded by one hundred twenty paragraphs of allegations of specific facts which show a denial of equal protection, discriminatory purpose and actions on the part of defendants. See pages 1 through 16 of plaintiffs' complaint.

B. A Cause of Action Arises Under the Fifth Amendment

Defendants can be sued directly for certain constitutional violations in a "*Bivens* action." *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) was an action by an individual against agents of the Federal Bureau of Narcotics alleging that they, while acting under color of federal authority, made a warrantless and unlawful entry of his apartment and without probable cause searched it and arrested him. The action was based upon the Fourth Amendment of the United States Constitution and 28 U.S.C. 1331(a).[2]

The complaint in *Bivens* set out that the plaintiff's arrest was "done unlawfully, unreasonably and contrary to law." The court expressly held that "the violation of [the Fourth Amendment] by a federal agent acting under color of his

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[2] 28 U.S.C. 1331(a) provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

There is no question as to the jurisdictional amount.

authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389.

In this case, plaintiffs allege that they were harassed, abused and discriminated against in job assignments, schools, training programs, evaluations and discharges in violation of federal statutes and the regulations of the United States Navy, to which they are entitled to the same protection as anyone else, and all without due process of law. The only difference between *Bivens* and this case is that *Bivens* was an action under the Fourth Amendment while plaintiffs are suing under the Fifth Amendment.

There is nothing in 28 U.S.C. 1331(a) or *Bivens* that would limit "*Bivens*" actions to Fourth Amendment actions. The Supreme Court has held both the Fourth and Fifth Amendments equally applicable to the defendants. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 516 (1973) (concurring opinion of Brennan and Marshall); *District of Columbia* v. *Carter*, 409 U.S. 418, 433 (D.C. Cir. 1973); *Obrien* v. *Brown*, 409 U.S. 1, 14 n.7 (1972) (dissenting opinion of Marshall).

A *Bivens* action may appropriately be brought under the Fifth Amendment against federal officers. *Vonder AHE* v. *Howland*, 508 F.2d 364, 372 (9th Cir. 1975); *Wounded Knee Legal Defense/Offense Comm.* v. *FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Apton* v. Wilson, 506 F.2d 83, 96 (D.C. Cir. 1974); *States Marine Lines, Inc.* v. *Shultz*, 490 F.2d 1146, 1156-7, (4th Cir. 1974) (contains court's analysis of why *Bivens* remedy is equally applicable in both Fourth and Fifth Amendment situations). See also, *Butler* v. *United States*, 365 F.Supp. 1035 (D. Haw 1973) which allowed a damage claim against military officers for violating First Amendment rights.

The action which states a valid claim against the defendants is a proper pleaded *Bivens* action.

Plaintiffs were entitled to the same rights as any person under the Constitution and laws of the United States and in this case under the rules and regulations of the United States Navy. For violation of those rights which fall within the wording of the statutes and regulations, plaintiffs are entitled to relief.

VI
ABSOLUTE IMMUNITY IS QUESTIONABLE

The final argument of the defendants under the motion to dismiss argues for dismissal because of absolute immunity for exercise of judicial functions. See defendants' motion, pages 15-16. They argue that this involves the claim of plaintiff LEMONS against all defendants for the action at Article 15. Also it concerns the claim of plaintiff SHANNON against all defendant sfor the attempt to discharge him.

First, it is submitted that the defendant CHAPPELL who held the Article 15 proceeding does have an immunity from suits for damages only. However, the suit does not name CHAPPELL as a defendant in that cause of action. But even more important, plaintiff LEMONS alleges that the crux of his claim is a discriminatory evaluation for advancement. It was based on three areas of discrimination, two in job assignments and one in Article 15 action. So the claim is based on action other than the Article 15 claim. Also the party can still obtain "judicial review" of the action by the immune official to determine whether it was invalid under the *Economou* case.

Similar considerations exist for plaintiff SHANNON. As far as the discharge is concerned, only defendant CHAPPELL was involved. But his claim also rests upon discriminatory evaluations and threats. All are reviewable pursuant to *Economou* to determine if they are lawful or unlawful.

Thus, the claims for immunity only extend to CHAPPELL concerning the discharge for plaintiff SHANNON, but his actions are still reviewable.

VIII
DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Defendants filed ten affidavits from various members of the U.S.S. Decatur. They are dated from October 30, 1978 to November 9, 1978. They total thirty-seven (37) pages of

facts. They were all collected while the vessell was ported in San Diego prior to its leaving for duty in the Western Pacific on November 11, 1978.

The defendants' motion was mailed on November 22, 1978, and received by plaintiffs' counsel on Monday November 27, 1978. At that time the U.S.S. Decatur had left Hawaii for the Philippine Islands. It is impossible to get affidavits from the five defendants without taking a journey to the Philippine Islands to do so. Expenses would be prohibitive and the plaintiffs are unable to afford it. It would be even more difficult now since, according to the *San Diego Union* of December 31, 1978, the ship is now heading for the Straits of Malacca in connection with the situation in Iran. See Exhibits "E" and "F", attached hereto.

According to Rule 56 of the Federal Rules of Civil Procedure (Title 58) where it appears from the affidavit of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify opposition, the court may refuse the application or order a continuance. See, *Robins Construction Company* v. *United States*, 345 F.2d 610 (3rd Cir. 1965); *Willmar Poultry Company* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289 (7th Cir. 1975) *cert. denied* 424 U.S. 915 (1975).

Plaintiffs' attorney has attempted to correspond with plaintiffs, but at this date has received no reply concerning these affidavits. See Exhibits "E".

A continuance is requested until the vessel returns in May of 1979.

CONCLUSION

For the preceding reasons, the motion to dismiss and for summary judgment should be denied, or in the alternative, plaintiffs should be allowed to amend their complaint and the motion for summary judgment continued.

Respectfully submitted,

JOHN MURCKO
Attorney for Plaintiffs

DATED: DECEMBER 31, 1978

DEPARTMENT OF THE NAVY
Board for Correction of Naval Records
Washington, D.C. 20370

trg
23 October 1978

John Murcko, Esquire
P. O. Box 8284
San Diego, CA 92102

Dear Mr. Murcko:

This refers to your interest in the cases of Navy Enlisted Members Cornelius Hickey, James Richardson, George Shannon and Vernon Wallace.

Allegations of racial discrimination and assignments to schools are matters under the cognizance of the Chief of Naval Personnel. Accordingly, the Board cannot taken jurisdiction of these cases at this time.

It is regretted that a more favorable reply cannot be made but the Board's procedures require that all administrative remedies be exhausted prior to acceptance by the Board.

Sincerely,

ROBERT D. ZSALMAN
Deputy Executive Director

Exhibit "A"

DEPARTMENT OF THE NAVY
Board for Correction of Naval Records
Washington, D.C. 20370

TRG:gam
26 October 1978
3463-78

EM3 Robert Lemons, USN
c/o Mr. John Murcko, Esquire
P.O. Box 8284
San Diego, CA 92102

Dear

Reference is made to your Application for Correction of Naval Record (DD Form 149) of 20 August 1978.

In accordance with the Board's standard practice, the records in this case were referred to the office within the Navy Department having cognizance over the subject matter addressed in your application for an advisory opinion relative to the issues presented therein. The enclosed letter was furnished in response to the Board's request. This opinion, which is advisory only and is not binding upon the board or the Secretary of the Navy, is forwarded for your information.

If you desire to submit any further statement or additional documentary material in support of your application, it is requested that you transmit same directly to this Board within the next 30 days.

In the event you find it inconvenient to respond within the 30-day period, kindly indicate prior to the termination of such period the approximate date that your reply will be forthcoming. If no response is received within the 30-day period, your case will be decided on the evidence of record as soon as a crowded docket will permit.

Sincerely,

ROBERT D. ZSALMAN
Deputy Executive Director

Enclosure

Exhibit "B"

DEPARTMENT OF THE NAVY
Bureau of Naval Personnel
Washington, D.C. 20370

In Reply Refer to
Pers-3Dc-VWK:bcj
454-74-1259
19 October 1978

MEMORANDUM FOR BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: LEMONS, Robert C., EM3, USN; comments and recommendations in the case of

Encl: (1) Pers-14 Memo of 18 October 1978
(2) BCNR File
(3) Subject's Microfiche Record

1. Enclosure (1) is forwarded herewith for consideration.

V. W. KIKTA
BUPERS/BCNR Coordinator

UNITED STATES GOVERNMENT
MEMORANDUM

Assistant for BCNR Matters (Pers3Dc)

DATE: 18 Oct 1978

Special Assistant for Legal Support (Pers-14)

Request for correction of records in the case of EM3 Robert C. LEMONS, USN, 454-74-1259; opinion concerning

(a) Pers-3Dc meno Pers-3Dc:VWK:bcj of 6 Oct 1978
(b) SNM's microfiche service record
(c) BCNR file on SNM
(d) 10 U.S.C. 1552
(e) 32 C.F.R. 723, BCNR Regulations
(f) Chapter XXVI, MCM, 1969 (Rev)
(g) BUPERSMAN 3410150

1. Reference (a) requested written comments and recommendations regarding SNM's request for correction of his records, taking into consideration current standards and policies.

2. SNM requests: (a) Removal from his service record of the nonjudicial punishment (NJP) imposed 19 July 1978 for violation of Art. 92, UCMJ-failure to obey a lawful order for which SNM was awarded a forfeiture of $50 pay for one month; and (b) that his report of Enlisted Performance Evaluation (NAVPERS 1616/5) dated 31 July 78 be corrected to reflect marks of 3.8 in each trait and that the "recommendation against advancement be changed to one for advancement".

3. SNM's sole basis for requesting the expungement of the NJP and changes in the NAVPERS 1616/5 is "because of racial prejudice on the part of the command of the USS DECATUR". A review of references (b) and (c) reveal no substantiating documents or explanation of SNM's assertion of racial prejudice.

4. Although the BCNR has the authority to grant the relief requested by SNM under references (d) and (e), it is recommended that the requested relief be denied. This recom-

mendation is based on the failure of SNM: (a) to exhaust all effective administrative remedies; and (b) to present sufficient relevant evidence to demonstrate the existence of probable material error or injustice. These latter two requirements are contained in Sections 723.3(c) and (e), respectively, of reference (e).

5. If SNM considered the NJP imposed unjust he should have, and may still, pursue an appeal under the provisions of reference (f). An appeal must be made "within a reasonable time" with 15 days after imposition of NJP considered reasonable. Since the NJP was imposed less than 3 months ago on 19 July 1978, a decision on the appeal may be pursued by SNM and perhaps a review will be granted. Further, should BCNR consider SNM's request absent an appeal, there is no evidence to substantiate SNM's claim of racial prejudice.

6. The Enlisted Performance Evaluation, dated 31 July 1978, appears to be correctly executed under reference (g) and is signed by SNM. Given SNM's request to upgrade all marks to 3.8 and change the recommendation for advancement must be rejected because of the lack of any evidence to substantiate his claim of racial prejudice in the execution of the document. SNM may submit a statement concerning the questioned Enlisted Performance Evaluation under reference (g). This statement must be sent via the SNM's commanding officer and the statement will be made part of the SNM's service record. SNM may also submit a statement for inclusion in his service record concerning the questioned NJP.

7. For the reasons stated above, it is recommended that the relief requested be denied.

R.J. MCCARTHY
Captain, JAGC, USN
Spec. Asst. for Legal Support

P.O. Box 8284
San Diego, Calif. 92102
August 27, 1978

Congressman Ronald Dellums
House of Representatives
Washington, D.C.

Dear Congressman Dellums:

With all respect and appreciation for special consideration to conduct a congressional investigation, I am one of five (5) crew members on board the U.S.S. Decatur (DDG-31) homeported in San Diego, California. We have been experiencing "great oppression, discrimination and harassment" from our chain of command. I myself and the others are Afro-Americans and out of the two (2) years I have served on board, it has not improved.

It is even worse. The highest ranking Black is an E-7 (Chief Petty Officer). Sir, this command has Ku Klux Klan activities in which they have made no attempt to resolve. I had to testify before Court about this activity and instead of getting better, it is getting worse for the minorities, excluding Filippino-Americans, (this I don't know why). We are not told of any chance of advancement, schools, etc. and out of 340 personnel (officer and enlisted) there is less than 10% Black, e.g., 20 Blacks, 4 Mexican-Americans.

Sir, the treatment on this commands needs to come to an end. Please consider my request on an adequate level.

Sincerely,

Vernon J. Wallace Jr.

Exhibit "C"

JOHN MURCKO
ATTORNEY AT LAW
861 SIXTH AVENUE (SUITE 806)
POST OFFICE BOX 8284
SAN DIEGO, CALIFORNIA 92102

November 13, 1978

AREA CODE 714
TELEPHONE 235-6921

Chief of Naval Personnel
Department of the Navy
ATTN: Captain McCarthy
Washington, D.C. 20370

RE: Vernon Wallace, Robert Lemons,
George Shannon, Cornelius Hickey,
James Richardson

Dear Sir:

Please be advised that I am writing to you concerning the intentionally discriminatory treatment afforded to the above five members of the U.S.S. Decatur by their command.

The discriminatory treatment is in job assignments, school assignments, rotation, promotion, evaluations, captain's mast, discharges and threats by the command against the five Black crew members.

Included are the following documents:

A. Statement of J. Richardson
B. Statement of V. Wallace
C. Statement of R. Lemons
D. Transfer Order of R. Lemons
E. Evaluation of V. Wallace
F. Evaluation of V. Wallace
G. Evaluation of V. Wallace
H. Complaint of Five Crew members

Would you please investigate these complaints and grant the necessary job promotions, assignments, school assignments, correct the evaluations, and correct the captains

mast and attempts for discharge. Also stop the discriminatory action aboard the U.S.S. Decatur by the Command by any means possible. Finally, please transfer the plaintiffs off of the vessel.

Please notify me of your intentions in this regard.

Sincerely,

John Murcko

JM/aem

Exhibit "D"

a-4 THE SAN DIEGO UNION Sunday, December 31, 1978

Connie' Voyage Called Routine

WASHINGTON (UPI)—The Navy yesterday dispatched a San Diego-based aircraft carrier and five support vessels toward the Malacca Straits on what it called "routine operations," the Department of Defense said.

A spokesman said the vessels included a guided missile cruiser, two guided missile destroyers and a conventional destroyer. The task group was supported by the Mispillion, a tanker and oiler.

"A U.S. Navy task group consisting of the USS Constellation, the USS Leahy, the USS Hoel, the USS Decatur, and the USS Kincaid has left Subic Bay in the Philippines and is proceeding into the South China Sea on routine operations," the Pentagon spokesman said.

Officials at the State Department said the task force has been ordered to proceed as far as the Malacca Straits between the Indonesian Island of Sumatra and Malaysia but no further toward the Persian Gulf.

The mounting turmoil in Iran and the growth of anti-American feeling forced a mass exodus by American, British and Dutch oil workers and their families duirng the weekend.

The Defense Department on Friday said a seven-vessel Middle East Task Force operating in the area south of the Persian Gulf was carrying out only routine naval maneuvers.

"It's certainly not a landing force," the Pentagon said.

Vessels in those waters fall under the command of the U.S. 7th Fleet operating in the Pacific Ocean.

DECLARATION

I, JOHN MURCKO, depose and say:

1. I am the attorney for the plaintiffs.

2. I received the motion for summary judgment on Monday, November 27, 1978, because of the Thanksgiving holiday.

3. The U.S.S. Decatur was in port at Naval Station, San Diego, California, until November 11, 1978. It was in port in Pearl Harbor, Hawaii from November 18, 1978 to November 27, 1978. It then left for the Philippines.

4. I am unable to go to the Philippines to obtain affidavits from plaintiffs because the plaintiffs cannot afford such expense. I also do not know where the ship presently is located. I have written to plaintiffs asking for replies to the ten statements on December 11, 1978. To this date, I have not received a reply.

5. The vessel will return to San Diego in May of 1979.

I declare under penalty of perjury that the preceding is true and correct.

Executed in San Diego, California, on December 31, 1978.

_____

JOHN MURCKO

Exhibit "F"

SUPREME COURT OF THE UNITED STATES

No. 82-167

George C. Chappell, et al., Petitioners,

v.

Vernon Wallace, et al.

ORDER ALLOWING CERTIORARI. Filed November 1, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.